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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1966

## No. 951

HARVEY B. COLLINS,

*Petitioner,*

vs.

GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES, GEORGE WADE, SR., AUBREY TODMAN, LUTHER BENJAMIN, CLIFFORD BENJAMIN and "JOHN DOE" a Person, Association or Incorporation, being a fictitious name, jointly, severally and in the alternative,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI

## to the United States Court of Appeals for the Third Circuit

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to the United States Court of Appeals
for the Third Circuit

Melvin M. Belli, on behalf of Harvey B. Collins, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit

entered in this case on September 14, 1966. Rehearing denied below October 10, 1966.

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## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a-16a) is reported at 366 F.2d 279 (1966). The opinion of the District Court (App. B, *infra,* pp. 17a-29a) is reported at 236 F.Supp. 441 (1964).

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## JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1966 (App. C, *infra,* pp. 30a-31a). Rehearing was denied on October 10, 1966 (App. D, *infra,* pp. 32a-33a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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## QUESTIONS PRESENTED

(1) Whether a defendant in a civil case can rely on a jury demand made by another defendant, who was dropped as a party before trial, if the issues involved with respect to each defendant are different?

(2) Whether a defendant in a civil case waives the right to a jury trial by going to trial after the trial Court orders a non-jury trial?

(3) Whether a defendant in a civil case waives the right to a jury trial by consenting to the dropping as a party another defendant who had made the only jury demand?

## STATUTES AND RULES INVOLVED

Rule 38 of the Federal Rules of Civil Procedure provides in part:

> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule 5(b) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Rule 39 of the Federal Rules of Civil Procedure provides in part:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by

jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court proceeding without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

"(b). By The Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues."

Act No. 921 of the Fifth Legislature of the Virgin Islands of the United States, approved January 25, 1963, provides:

"To Consent to the Institution of an Action in Court Against the Government of the Virgin Islands by Harvey B. Collins, in Connection With Personal Injuries Sustained by Harvey Collins.

"Be it enacted by the Legislature of the Virgin Islands:

"Section 1. Harvey B. Collins is authorized to file suit against the Government of the Virgin Islands on his claim for losses arising out of injuries sustained on February 4, 1961, as a result of an automobile accident as to which Harvey B. Collins alleges the Government of the Virgin Islands to be liable.

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of

the Government to suit is hereby waived and Harvey B. Collins may proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; Provided, That nothing contained herein shall be construed as an admission of liability on the part of the Government.

"Section 3. The Claimant, Harvey B. Collins, shall commence the action authorized by this Act within two months from the effective date of this Act.

"Section 4. This Act shall take effect upon its approval."

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**STATEMENT**

The Petitioner was seriously injured when the car which he was driving collided with a disabled truck on Harwood Highway, St. Thomas, Virgin Islands, in the early morning hours of February 4, 1961. The truck, which was owned by Luther Benjamin, had been left upon the traveled portion of the highway after it blew two rear tires during the afternoon of February 3, 1961. William Samuel Wade, the driver, did not report the breakdown to the authorities. The authorities subsequently became aware of the presence of the truck and they allowed it to remain on the highway throughout the afternoon and evening. Collins collided with the right rear of the truck while he was returning from town to the Submarine Base where he was stationed.

On February 1, 1963 Collins filed suit in the District Court of the Virgin Islands to recover for the injuries he received in the accident. He named as defendants the Government of the Virgin Islands, Luther Benjamin and William Samuel Wade. Only Luther Benjamin demanded a jury trial.

The Government of the Virgin Islands was named as a defendant pursuant to special legislation, Act No. 921, January 25, 1963, which authorized Collins to file suit against the Government and provided that he "may proceed against the Government as in the case of any other defendant."

On October 24, 1964, the morning of the trial, Petitioner moved to dismiss with prejudice the action against all defendants except the Government of the Virgin Islands. All parties agreed to this dismissal, and the District Court entered an Order accordingly. The Court then advised the Government of the Virgin Islands that the case would be tried without a jury since the Government did not demand a jury trial.

On the afternoon of October 24, 1964, the Government filed with the Court a written motion for trial by jury. The motion was directed to the discretion of the Court pursuant to Rule 39(b) of Federal Rules of Civil Procedure. The Court denied the Government's motion and the Government went to trial without a jury.

The trial took four days. On December 21, 1964, the Court entered its Findings of Fact and Conclusions of Law. The Court found that the Government of the Virgin Islands was negligent in that its agents

and employees after due notice, of the existence of a hazard, nuisance and breach of the laws, wilfully failed to keep the highway in reasonably safe condition and wilfully failed to administer, supervise and enforce the regulations and laws covering the operation of motor vehicles. The Court further held that the Government was negligent in that it wilfully failed to mark the truck's presence with appropriate lights and flares and wilfully failed to warn the users of the highway of its location and wilfully allowed the dangerous condition and nuisance to remain for many hours and negligently and wilfully failed to take any precaution to remove, abate, diminish, offset or counteract this dangerous condition and nuisance.

The Court further found that the truck constituted a public nuisance, an absolute nuisance under the laws of the Virgin Islands. The Court found that the misconduct of the Government of the Virgin Islands in omitting to perform its duties was wanton and wilful and that it was the proximate cause of the plaintiff's injuries. The Court further found that the plaintiff was not guilty of contributory negligence. On December 22, 1964, judgment was entered against the Government of the Virgin Islands in the sum of $550,000. (App. E, *infra,* pp. 34a-35a.)

The Court of Appeals reversed and remanded for new trial. The Court of Appeals held (366 F.2d 279, 285) "that where co-defendants are sued on the theory that they are jointly and severally liable for the same injury arising out of a single occurrence, a

request by one for jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well." The Court held that the Government of the Virgin Islands could rely on the jury demand made by the co-defendant Benjamin. The Court further held that the fact that Petitioner was allowed to drop his action against the individual defendant Benjamin with the consent of the Government of the Virgin Islands had no effect on the Government's right to a jury trial.

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## REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this Court. The Court has also rendered a decision which, although not meeting the point head-on is in conflict with the decision of another Court of Appeals on the same matter. See *United Press Association v. Charles,* 245 F.2d 21 (9th Cir. 1957), cert. denied 77 Sup.Ct. 1378 (1957), *infra.*

The first question presented is whether a defendant in a civil case can rely on a jury demand made by another defendant, who was dropped as a party before trial, if the issues involved with respect to each defendant are different.

The Government of the Virgin Islands could not rely on the jury demand made by another defendant. A jury demand made by one defendant enures to the

benefit of another defendant only as to the *issues* embraced therein. This rule was recognized by the Court of Appeals (366 F.2d 279, 284) when it states that:

> ". . . the better rule is that a defendant can rely on the jury demand of a co-defendant to the extent of the issues embraced by that demand."

The Court of Appeals supported this statement by reference to the leading commentators on the Federal Rules of Civil Procedure.

In 5 Moore Federal Practice, Section 28.45, at 343-44 (2nd ed. 1964) it is stated:

> "In other words if a timely and proper demand for jury is made all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand *for issues raised therein.*" (Emphasis added.)

In 2B Barron and Holtzoff, Federal Practice and Procedure, Section 877, at 49 (Wright ed. 1961) it is stated that:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested *in the issues as to which jury trial has been demanded* may rely thereon and need not make an additional demand of their own." (Emphasis added.)

It is clear from the above quoted authorities that a party may rely on a jury demand made by another party with respect to those issues raised in the demand. As to issues not raised in the jury demand of another party, the party must make his own de-

mand. The problem then simply becomes one of determining which issues were in fact included within the demand made by the party requesting the jury.

In *McAndrews v. United States Lines Co.*, 167 F. Supp. 41 (S.D.N.Y. 1958) a personal injury action was brought against defendant United States Lines. The plaintiff demanded a jury. The defendant impleaded two third party defendants. The action by the plaintiff McAndrews against the defendant United States Lines was discontinued and the only action remaining was that between defendant United States Lines and one third party defendant. The third party defendant argued that the jury trial demand made by the plaintiff gave him the right to a jury trial in his case with the defendant.

The Court stated at page 43:

> "It is true that if a timely and proper demand for jury is made, all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues embraced therein. 5 Moore's Federal Practice, pages 343-344, Section 38.45 . . .
>
> "However, no demand was made by either party as to the *issues* now about to be tried. The United States Lines Company is not benefited by any vicarious demand made for a jury trial by the plaintiff as to issues between plaintiff and the United States Lines Company. As to these *issues*, therefore both parties have waived a jury." (Emphasis added.)

The Court of Appeals attempted to distinguish *McAndrews v. United States Lines Co., supra*, by

stating that a theory of reliance will not aid a defendant where a jury trial is sought as to third party issues and the only demand for a jury trial was that indorsed upon the original complaint. However, *McAndrews* was concerned with the problem of different *issues* being involved with respect to the third party defendant and not with the fact that he was a *third* party. As long as the issues were different there could be no reliance on the jury demand.

The Court of Appeals referred to *De Pinto v. Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963), cert. denied 376 U.S. 950 (1964). It was held in *De Pinto* that when some defendants had not consented to the withdrawal of the jury trial demand of one of the plaintiffs, and other defendant *had* consented, the non-consenting defendants had not waived trial by jury. The Court in *De Pinto* at page 832 stated:

> "It is provided in Rule 38(d), Federal Rules of Civil Procedure, that the failure of a party to serve such a demand constitutes a waiver of trial by jury. But Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such a demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to."

It should be noted that in *De Pinto* the withdrawal of the jury demand was made by the plaintiff and the

defendants relied thereon. That is a very different case than the facts involved herein where the jury demand was made by one defendant and another defendant attempted to rely thereon.

The Court of Appeals attempted to meet this problem by stating (366 F.2d 279, at 285):

> "In this connection, Collins' contention that any reliance should be strictly limited to adverse parties is without merit. The language of Rule 38 refers to 'party' generally and cannot be read in the manner suggested by Collins."

However, the Court of Appeals cites no case authority for this proposition. In fact, all the cases dealing with the problem involve opposing parties.

It should be obvious that in multiparty cases a demand for jury trial made by a single defendant can only benefit a co-defendant with respect to the issues embraced in the original demand. Any other issues involving another defendant to be tried by a jury must be subject to an independent jury demand made by the other defendant. Only when the jury demand is made by the plaintiff can it possibly relate to all the issues involving all the defendants. In the situation when jury demand is made by a party on one side, the parties on the other side may rely on the demand since by definition the issues involving the opposing party must be identical.

The Government of the Virgin Islands benefited from the jury demand of Benjamin only with respect to contributory negligence. The complaint brought by

Petitioner alleged liability on the part of the Government of the Virgin Islands on three theories: negligence, maintenance of a nuisance and violation of statute. The complaint alleged the same three theories against the defendant Benjamin. However, the facts underlying the legal theories were very much different in the case of the two defendants. With respect to the Government of the Virgin Islands the complaint alleged negligence, the maintaining the public nuisance and the violation of the laws of the Virgin Islands.

With respect to the defendant Benjamin the complaint specifically alleged negligence in completely different areas. Negligence was alleged with respect of failing to have reflectors, illegally parking and abandoning a truck, not equipping the truck with the red tail lights, parking on a public street where it obstructed traffic, interfering with the usage of a public road, and the creating of a public nuisance. These alleged wrongs related to negligent conduct on the part of the defendant Benjamin in the *creation* of a nuisance and the violation of the laws of the Virgin Islands. The laws allegedly violated by Benjamin were different laws than those violated by the Government of the Virgin Islands.

In each case the allegations with respect to the defendant Benjamin were based on facts totally different from those allegations relating to the Virgin Islands. It would have been necessary for the trier of fact to make independent determinations with respect to the two defendants. The liability of one de-

fendant in no way was affected by the liability of the other.

The Court of Appeals attempted to meet the argument that the issues involved with respect to the two defendants were quite different by stating that:

> "Collins argues that the demand made by Benjamin cannot aid government because the 'issues' embraced within that demand are not the same as those between Collins and Government. He also urges that the theories of negligence are different as between Benjamin and Government and that the standard of care owed by Government is different as between the two. We do not find the differences asserted by Collins dispositive in the present situation." (366 F.2d 279, 285.)

The Court then goes on to state that this was an action brought by a single complaint against the Government and other defendants seeking to hold them jointly and severally liable for the same injury. The Court refers to Paragraph XVI of the Complaint.

Paragraph XVI of the Complaint states as follows:

> "That said accident and collision was caused by, precipitated through and was the proximate result of the carelessness, negligence, omissions and breach of duty of defendants George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin, 'John Doe' and the Government of the Virgin Islands of the United States."

The Court of Appeals states that Paragraph XVI of the Complaint "charged the defendants jointly." (366 F.2d 279, 285.) The word "jointly" did not

appear in Paragraph XVI of the Complaint. The purpose of Paragraph XVI in the Complaint was merely to allege one of the necessary elements in a negligence case—proximate cause. The plaintiff lumped together the various defendants in one paragraph after previously setting out separate theories of liability. Then, in this paragraph the element of proximate cause was brought in. This was the sole purpose of the paragraph.

From this the Court of Appeals went on to hold that:

> "Where co-defendants are sued on the theory that they are *jointly* and severally liable for the same injury arising out of a single occurrence, a request by one for a jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well." (Emphasis added.) (366 F.2d 279, 285.)

Here the defendants were not jointly liable. Defendants were sued individually on totally different theories. The holding of the Court of Appeals may, on its face, be correct, but it does not apply to the facts herein.

In fact, when the holding of the Court is examined carefully, it appears that the only situation that it applies to is the one herein. For if a defendant withdraws his jury demand in the ordinary case, his co-defendants would then have to consent to the withdrawal of the jury demand. This is particularly true when they are in fact jointly liable, in that the issues are common to all. Thus, it is only in a situation

exactly as the one at bar when the plaintiff dismisses as against one defendant that this problem could arise. In that case, if the defendants are indeed jointly liable, then they would each be protected by the jury demand of any other defendants. If, as is here involved, they are not jointly liable then they are protected by the jury demand made by another defendant only as to the issues raised in that demand.

The Court of Appeals refer to *Spiro v. Pennsylvania R.R. Co.*, 3 F.R.D. 351 (S.D.N.Y. 1942). In *Spiro* plaintiff brought a personal injury action against the Pullman Company and the Pennsylvania Railroad. He made a timely jury demand as against defendant Pennsylvania Railroad, but did not do so against defendant Pullman. The Court held that plaintiff had preserved his right to jury trial as to the "separate liability" of Pennsylvania Railroad and the "joint negligence" of the defendants, but had waived it as to the "separate liability" of Pullman. However, the Court held that since all the issues but the "separate liability" of Pullman would be tried to a jury, the Court in its discretion, under Rule 39(b), could order that all the issues as to both defendants be tried to a jury.

The holding in *Spiro* was correct since "joint negligence" was involved there. However, if "separate negligence" had been involved in *Spiro* the Court would have held that Pullman would not have its "separate negligence" tried by the jury. The jury demand by the plaintiff in *Spiro* would have then embraced only the issues involved between Spiro and

Pennsylvania Railroad relating to the separate negligence and separate liability of Pennsylvania Railroad.

Although the Complaint in Paragraph XVI did not allege joint liability, it did lump together all the defendants. However, it is well established that the right to a jury trial must be determined not by the form of the Complaint but by an appraisal of the claims, defenses and remedies. It is the issues, not the form of the case, that will determine the method of trial. 2B Barron and Holtzoff, Federal Practice and Procedure, Section 873; *Fraser v. Geist,* 1 F.R.D. 267 (Penn. 1940); *Beaunit Mills v. Eday Fabric Sales Corp.,* 124 F.2d 563 (2nd Cir. 1942); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477, 8 L.Ed. 2d 44 (1962) ("but the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."); *Swofford v. B. & W., Inc.,* 336 F.2d 406 (5th Cir. 1964).

As indicated above the issues of negligence were totally different with respect to the two defendants. If contributory negligence could be asserted as a defense here (see *infra*), then only that issue relating to contributory negligence would be common to both defendants. In that case the jury demand made by Benjamin would embrace within it the issue of contributory negligence and the Government of the Virgin Islands would benefit to that extent by the jury demand made by Benjamin. The conduct of Petitioner, if it could be construed as contributory negligence, and if contributory negligence were a valid

defense, would be based on the same facts with respect to both defendants. However, the trial Court held that the plaintiff was not guilty of contributory negligence.

Contributory negligence would not be a defense here. Contributory negligence is not a defense to a public or private nuisance. Prosser on Torts, 3rd edition, Section 92.

In 38 Am.Jur.2d (Negligence), Section 200, it is stated:

> "The cases are in substantial agreement that the ordinary rule of contributory negligence, which defeats recovery altogether in actions based on negligence as distinguished from nuisance, does not apply in the case of an absolute nuisance."

Contributory negligence is not a defense to a violation of a statute. Restatement of Torts, Section 483, states:

> "The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred on the defendant."

Contributory negligence is not a defense to wilful and wanton negligence. It is stated in 38 Am.Jur.2d (Negligence), Section 178:

> "There is an abundance of authority for the proposition that contributory negligence is not a defense to an action based upon wilful or wanton conduct or intentional violence."

The second question presented is whether a defendant in a civil case waives the right to a jury trial by going to trial after the trial court orders a non-jury trial. The District Court advised the Government of the Virgin Islands, after the dismissal of Benjamin and the other parties, that the case would be tried without a jury. The Government protested that it was entitled to a jury by reason of its reliance upon defendant Benjamin's demand for a jury trial. Despite its protest, the Government of the Virgin Islands then proceeded to trial. By so proceeding to trial the Government of the Virgin Islands waived its right to jury, if indeed it had such right at this point. The Government of the Virgin Islands should, at this point, have refused to go ahead to trial. If the Government of the Virgin Islands had refused to go to trial, it could then have appealed from any determination made by the trial Court. This would have preserved its objection and would have preserved its jury right, if indeed it had one at that juncture. However, by deciding to go to trial, the Government of the Virgin Islands gambled and lost.

There is a case almost directly on point. In *United Press Association v. Charles,* 245 F.2d 21 (9th Cir. 1957), cert. denied 77 S.Ct. 1378 (1957) neither plaintiff nor defendant asked for a jury trial timely. Thereafter defendant filed a motion for a jury trial and the Court denied such motion and then the Court entered an order directing a jury trial sua sponte. Plaintiff objected but went to trial. Plaintiff ap-

pealed from an unsatisfactory judgment on the grounds that there was a jury trial instead of trial by judge alone. The Court held, at page 25, that:

> "United Press was plaintiff. It was under duty to refuse to go to trial before a jury, if it intended to rely upon this procedural objection. If then the judge had dismissed the action for failure to prosecute, the existence of a personal right not to go to trial before a jury could have been tested. *United Press has now gambled on a jury trial and lost.* By its conduct, *any right it had was waived.*" (Emphasis added.)

The Court continued at page 28:

> "It must be remembered that the trial judge could not foresee the result when he granted jury trial. Certainly, Charles could not foresee that the verdict would be in his favor, since he was apparently lukewarm on the subject. And, save for claiming that witnesses would be better than their depositions, United Press at no time urged that trial by jury would be prejudicial to its interest until the verdicts had been rendered. United Press should have refused to go to trial. *But it took a chance, as we have seen. In any event, the matter of jury trial must be considered as of the opening of the trial and not in light of the outcome.*" (Emphasis added.)

There is good authority for the proposition that the Government of the Virgin Islands could have refused to go to trial without a jury and then make an immediate appeal. In *Cataldo v. E. I. Du Pont De Nemours Co.*, 253 F.Supp. 235 (S.D. N.Y. 1966) plaintiff brought an action for injuries and amended the complaint alleging a new cause of action. In the

original action a jury demand had not been made, but then the plaintiff sought jury trial on the amended cause of action. The defendant claimed that the plaintiff had waived a jury under Rule 38(b). The District Court held that an immediate appeal to the Court of Appeals was proper by the defendant since if the determination was not reviewed until after the trial on the merits a whole new trial would be necessary, should the Court of Appeals find for defendant. The Court held that an immediate appeal would not in any way delay prosecution of the action and that since there was substantial ground for difference of opinion an immediate appeal from the order might materially enhance the ultimate determination of the litigation. So, too, would an immediate appeal herein have materially advanced the ultimate determination of the litigation.

The Government of the Virgin Islands by not making an immediate appeal was able to get two opportunities to try the same case. If they lost, as they did, in the trial court, they could then appeal on the grounds that they had not waived a jury trial. Here, by consenting to go ahead to trial without a jury the Government of the Virgin Islands waived its jury rights a second time. This double waiver prevents the Government of the Virgin Islands from now asserting a denial of jury rights, if the first waiver had not been effective.

The third question presented is whether a defendant in a civil case waives a right to a jury trial by consenting to the dropping as a party of another defend-

ant who made the only jury demand. When the District Court dismissed the case against the other defendants, the Government of the Virgin Islands consented to the dismissal.

The Court of Appeals, in its opinion, stated that the fact that Collins was allowed to drop his action against Benjamin with the Government's *consent* had no effect on the Government's right to a jury trial.

Rule 38(d) of the Federal Rules of Civil Procedure provides that a demand for trial by jury made within Rule 38 may not be withdrawn without the consent of the parties. Here the Government of the Virgin Islands consented to the dismissal of the action as against the other defendants. Implicit within this consent to the dismissal was a consent to the withdrawal of the jury demand made by the defendant Benjamin. When the Government agreed to allow the case to be dropped as against Benjamin, it, at the same time, waived any claim that it had to a jury based on Benjamin's jury demand with respect to those issues embraced by his demand which were common to the Government of the Virgin Islands.

The ruling of the trial court in denying a jury trial was in agreement with the overall policy considerations of the Federal Rules of Civil Procedure. Under the Federal Rules of Civil Procedure it is very simple to get a jury trial. All one must do is request one in accordance with Rule 38(a). Rule 38(a) provides that a jury demand must be made within 10 days after the last pleading is filed. This rule is interpreted strictly. Although the right to jury is an important right, it is

lost unless the technical requirement of the Federal Rules of Civil Procedure are met. Ample opportunity is given to a party to demand a jury and if he does not exercise his right within the prescribed time, his right is gone forever.

According to this basic policy regarding the right to jury in the Federal Courts, it is clear that the Government of the Virgin Islands had ample opportunity to demand a jury at the outset. It need have only indorsed its answer requesting a jury. This it failed to do. It therefore lost its right to a jury trial. The Government of the Virgin Islands was only protected by the jury demand made by Benjamin as to the issues embraced within that demand.

Although historically the value of jury trial is highly regarded "today these views are not universally accepted, and assertions are made that trial by jury is a luxury which can no longer be afforded." 2B Barron and Holtzoff, Federal Practice and Procedure, Section 871 (Wright ed. 1961). In James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L.J. 1022, 1026, it is stated:

> "The right of jury trial should not be expanded. This method of settling disputes is expensive and dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as not to jeopardize the attainment of the other objectives."

The Court of Appeals discussed the "presumption" against waiver of the right to jury trial. In this connection, it is stated in *Transocean Airlines v. Pan*

*American World Airways, Inc.*, 36 F.R.D. 43 (S.D. N.Y. 1964) that "there is no longer any occasion to indulge any presumption against waiver."

It should be noted that with respect to Rule 39(b) giving the trial court discretion in allowing a jury trial when a demand is not made timely, it has been held that to invoke the Court's discretion in granting a jury trial extraordinary circumstances should appear. *Leve v. General Motors Corp.*, 248 F.Supp. 344 (S.D.N.Y. 1965); *Gottesman v. Texas Petroleum Co.*, 26 F.R.D. 623 (S.D.N.Y. 1961); *Second-Seventy-Ninth Street Company v. United States Steel Corp.*, 22 F.R.D. 98 (S.D.N.Y. 1958). So too should such extraordinary circumstance appear to negate the finding of a waiver as herein involved.

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## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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**(Appendices Follow)**